

AO 120 (Rev. 08/10)

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| TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450 | REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK |
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Southern District of Ohio - Cincinnati on the following

☒ Trademarks or ☐ Patents. (☐ the patent action involves 35 U.S.C. § 292.):

| | | |
|--------------------------------------|-----------------------------|--|
| DOCKET NO. 1:11-cv-135 | DATE FILED 3/3/11 | U.S. DISTRICT COURT Southern District of Ohio |
| PLAINTIFF Euclid Chemical Company | | DEFENDANT Robert Ware d/b/a Robert Kelly Constructors – RKC and RKC Increte Systems, Inc. |
| PATENT OR TRADEMARK NO. | DATE OF PATENT OR TRADEMARK | HOLDER OF PATENT OR TRADEMARK |
| 1 3,913,070 | | See attached Complaint |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

| | | |
|-------------------------|---|-------------------------------|
| DATE INCLUDED | INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading | |
| PATENT OR TRADEMARK NO. | DATE OF PATENT OR TRADEMARK | HOLDER OF PATENT OR TRADEMARK |
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |

In the above—entitled case, the following decision has been rendered or judgement issued:

| |
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| DECISION/JUDGEMENT |
|--------------------|

| | | |
|------------------------------|--------------------------------------|-----------------------|
| CLERK James Bonini, Clerk | (BY) DEPUTY CLERK s/M. Rogers, DC | DATE March 3, 2011 |
|------------------------------|--------------------------------------|-----------------------|

Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director
 Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

Notices

1:11-cv-00135-HJW Euclid Chemical Company v. Ware et al
JURY

U.S. District Court
Southern District of Ohio

Notice of Electronic Filing

The following transaction was entered on 3/3/2011 at 4:45 PM EST and filed on 3/3/2011

Case Name: Euclid Chemical Company v. Ware et al

Case Number: 1:11-cv-00135-HJW

Filer: Euclid Chemical Company

Document Number: 4

Docket Text:

REPORT ON THE FILING OF AN ACTION REGARDING A TRADEMARK by Plaintiff Euclid Chemical Company re [1] Complaint. (mr1)

1:11-cv-00135-HJW Notice has been electronically mailed to:

Christopher S Williams cwilliams@calfee.com, mmchugh@calfee.com

Colleen A Conley cconley@calfee.com, colleenannetteconley@gmail.com

1:11-cv-00135-HJW Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1040326259 [Date=3/3/2011] [FileNumber=3058375-0]
[8afe1051fff71953af08265c85ae5f63ff44e7d26bc8bbb6765c8b00577bd11f9843
25a08140989385b56f7f7021741a18795332fa627b5e2b55a1f5a6f4dd32]]

FILED

MAR 02 2011

JAMES BONINI, Clerk
CINCINNATI, OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE EUCLID CHEMICAL COMPANY
19218 Redwood Road
Cleveland, Ohio 44110,

Plaintiff,

v.

ROBERT WARE, d/b/a
ROBERT KELLY CONSTRUCTORS --
RKC,
3546 Eastern Avenue
Cincinnati, Ohio 45226,

And

RKC INCRETE SYSTEMS, INC.,
3546 Eastern Avenue
Cincinnati, Ohio 45226,

Defendants.

No. **1:11 CV 135**

Judge WEBER, J.

Magistrate _____

**COMPLAINT FOR INFRINGEMENT
OF A REGISTERED TRADEMARK
AND RELATED STATE CLAIMS, FOR
BREACH OF CONTRACT, AND
INJUNCTIVE RELIEF AND MONEY
DAMAGES**

JURY TRIAL DEMANDED

NOW COMES the Plaintiff, The Euclid Chemical Company, for its Complaint for Injunctive Relief and Money Damages against Robert Ware, doing business as "Robert Kelly Constructors -- RKC," and RKC Increte Systems, Inc., (collectively, the "Defendants"), states and alleges as follows:

THE PARTIES

1. The Euclid Chemical Company ("Euclid") is a corporation duly organized and operating under the laws of the State of Ohio that maintains its principle place of business in Cuyahoga County, Ohio.

2. Upon information and belief, RKC Increte Systems, Inc. ("RKC") is an Ohio corporation with its principal place of business at 3546 Eastern Avenue, Cincinnati, Ohio 45226.

3. Upon information and belief, Robert Ware ("Ware") is an individual, is a resident of Ohio, is a principal of RKC, and has done business under the name "Robert Kelly Constructors -- RKC."

JURISDICTION AND VENUE

4. Euclid's claims for relief set forth herein arise in part under the Trademark Laws of the United States, 15 U.S.C. § 1051 *et seq.* This Court has original subject matter jurisdiction over Euclid's trademark claims asserted herein pursuant to 28 U.S.C. §§ 1331 & 1338(a), and 15 U.S.C. § 1121(a).

5. Defendants also are liable to Euclid for breach of contract, for unfair competition, and for breach of the Ohio Deceptive Trade Practices Act ("ODTPA"). This Court has supplemental jurisdiction over these state law claims pursuant to 28 U.S.C. § 1367(a).

6. This Court has personal jurisdiction over Defendants by virtue of Defendants' residences, which, upon information and belief, are believed to be within this judicial district.

7. Defendants conducted wrongful activity in this judicial district that gives rise to Euclid's claims for relief. Moreover, upon information and belief, Defendants are residents of Hamilton County, Ohio. Accordingly, this action is properly venued in this Court under 28 U.S.C. 1391(a).

FACTS COMMON TO ALL COUNTS

EUCLID'S TRADEMARKS

8. Euclid is a global provider of products and services to the concrete and masonry construction industries, including concrete and masonry admixtures, curing and sealing compounds, concrete repair mortars and toppings, adhesives, architectural and industrial coatings, sealants, resins, chemical compounds, and other products.

9. In 2008, Euclid acquired the assets of Inco Chemical Supply Company ("Inco"), which was a company that manufactured and sold, throughout the United States, through authorized distributors, under the names INCRETE and INCRETE SYSTEMS, a stamped concrete system available in a wide array of patterns duplicating granite, slate, stone, brick and even wood with related resin and chemical compounds. All rights and title to the INCRETE and INCRETE SYSTEMS marks was acquired by Euclid from Inco in 2008. Upon information and belief, Inco is no longer an existing legal entity.

10. Under the names INCRETE and INCRETE SYSTEMS, Euclid has continued to manufacture and sell, throughout the United States and through distributors, products under the INCRETE and INCRETE SYSTEMS marks.

11. The INCRETE and INCRETE SYSTEMS marks have been continuously used in interstate commerce on or in connection with the products since at least 1986, and Euclid, and previously Inco and/or related companies, have devoted significant resources to the promotion of the products and the INCRETE and INCRETE SYSTEMS marks since that time.

12. Euclid is the owner of U.S. Trademark Registration No. 3,913,070 ("the '070 Registration") for the word mark INCRETE SYSTEMS in International Class 001 and 019 for "pre-cast concrete wall forms made of polyurethane;" resin made of "styrene acrylic for use in

grout; chemical compounds for use in the curing of cementitious mixtures, chemical compounds for the use in etching and finishing of surfaces made of cementitious materials; [and] stamping tool release compounds for use in the manufacture of surfaces made from cementitious mixtures” (the “stamped concrete system products”).

13. The ‘070 Registration issued on February 1, 2011, and matured from an application filed on February 24, 2010, which date by law is the nationwide constructive priority date with respect to the rights of Euclid in the mark INCRETE SYSTEMS. A true and correct copy of the ‘070 Registration is attached hereto as Exhibit 1.

14. By virtue of 15 U.S.C. Section 1057, the ‘070 Registration is prima facie evidence of the validity of the mark INCRETE SYSTEMS, the validity of the ‘070 Registration, Euclid’s ownership of the ‘070 Registration, and of Euclid’s exclusive right to use the mark in commerce on or in connection with the goods identified in the ‘070 Registration.

15. Euclid’s mark INCRETE SYSTEMS is an inherently distinctive trade designation that distinguishes Euclid’s stamped concrete system products from such products of others. Alternatively, on information and belief, the mark INCRETE SYSTEMS has acquired distinctiveness by virtue of Plaintiff’s use of the mark in commerce for almost twenty-five years, its longstanding efforts to promote INCRETE SYSTEMS products, and the ongoing success with which such products have met in the marketplace.

16. As a result of the success of the INCRETE and INCRETE SYSTEMS products in the marketplace and the significant promotional efforts and expenditures made by Euclid and its predecessor and related companies, the INCRETE and INCRETE SYSTEMS marks have, on information and belief, acquired distinctiveness above and beyond their inherent distinctness,

have developed strong brand recognition among consumers, and have become valuable assets of Euclid worthy of protection.

DEFENDANTS' UNAUTHORIZED USE OF THE INCRETE AND INCRETE SYSTEMS MARKS, DEFENDANTS' FALSE AND MISLEADING STATEMENTS, AND UNFAIR COMPETITION

17. Starting in 1992, Defendants became a distributor of Inco's INCRETE and INCRETE SYSTEMS products, and Inco authorized Defendants to use the INCRETE and INCRETE SYSTEMS marks in relation to their distribution of such products.

18. After Euclid acquired the assets of Inco in 2008, Defendants continued as distributors of INCRETE and INCRETE SYSTEMS products, and Euclid permitted Defendants to use the INCRETE and INCRETE SYSTEMS marks in relation to Defendants' distribution of such products.

19. Since 2009, Defendants have failed to pay Euclid more than \$44,000.00 for products that Euclid supplied to Defendants.

20. In 2009 and 2010, Euclid made written demands to Defendants for full payment of the account balance, and Defendants have not complied with such demands.

21. On September 16, 2010, Euclid gave Defendants written notice of Euclid's intent to terminate their business relationship (the "Sept. 2010 Letter"). A true and correct copy of the Sept. 2010 Letter is attached hereto as Exhibit 2.

22. In the Sept. 2010 Letter, Euclid instructed Defendants to pay the amounts owed to Euclid in full on or before October 1, 2010, and if Defendants did not do so, Euclid further advised that Defendants would be required to cease any use or reference to the INCRETE and INCRETE SYSTEMS marks, as well as all other trademarks of Euclid. Specifically, Euclid instructed the Defendants to "cease any use or reference in any way to the Increte brand name

...including without limitation, on product packaging, on the RKC website or in any RKC advertising or promotions.”

23. Defendants have not responded to Sept. 2010 Letter and still have not paid the money they owe to Euclid.

24. Upon information and belief, Defendants have no remaining inventory of the products they purchased from Euclid. Nonetheless, Defendants have continued to use the INCRETE and INCRETE SYSTEMS marks since receipt of the Sept. 2010 Letter.

25. Defendants’ continued use of the INCRETE and INCRETE SYSTEMS marks is unauthorized, is likely to cause confusion in the marketplace as to the source of Defendants’ goods, and is causing Euclid continuing harm.

26. In addition to using the INCRETE and INCRETE SYSTEMS marks without authorization, Defendants have falsely claimed on their website and in printed advertising, that RKC is “the Tri-State distributor of Increte Systems” and provides “training and support to a network of successful, independent Increte Contractors.” A true and correct copy of a screenshot from RKC’s website as it appeared on February 18, 2010, is attached hereto as Exhibit 3.

27. Defendants’ statements that RKC is “the Tri-State distributor of Increte Systems” is false because Euclid has withdrawn and terminated authorization for Defendants to use the Marks and has terminated all business relationships with Defendants.

28. Defendants’ statements that it provides “training and support to a network of successful, independent Increte Contractors” are false and misleading as Defendants are not authorized by Euclid to provide training or support, and because Euclid has withdrawn and terminated authorization for Defendants to use the Marks and has terminated all business relationships with Defendants

29. Upon information and belief, Defendants also act as contractors and, by using the INCRETE and INCRETE SYSTEMS marks and by other means, Defendants have created a false impression with their customers and the public that Defendants are installing and using Euclid's stamped concrete system products.

COUNT I
UNFAIR COMPETITION AND FALSE ADVERTISING - LANHAM ACT VIOLATIONS

30. Euclid incorporates by reference the above paragraphs of this Complaint as if fully rewritten herein.

31. The Lanham Act prohibits any person who, on or in connection with any goods or services, from using in commerce any false or misleading description of fact, or false or misleading representation of fact in commercial advertising or promotion, which misrepresents the nature, characteristics, or qualities of his or her or another person's goods, services, or commercial activities.

32. The Lanham Act also prohibits the use of false or misleading description of fact, or false, or misleading representation of fact on or in connection with any goods or services which is likely to cause confusion, or to cause mistake.

33. Upon information and belief, Defendants' willful, intentional, unauthorized and false representations described herein, which Defendants have used on their website, and in connection with other efforts to market, advertise, promote, and offer for sale concrete products and services, have caused and are likely to continue to cause confusion, to cause mistake, and to deceive a meaningful portion of the relevant public concerning Defendants' affiliation with Euclid.

34. The conduct complained of herein constitutes unfair competition and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.

35. Euclid has been damaged as a direct and proximate result of Defendants' aforementioned conduct in an amount to be proven at trial.

36. Defendants' conduct has damaged and will continue to damage Euclid's goodwill and reputation, has caused and is likely to continue to cause loss of profits and irreparable injury to Euclid, as well as harm to the public, which is confused by Defendants' unlawful and misleading conduct. Euclid has no adequate remedy at law to prevent and correct Defendants' unlawful conduct and is entitled to injunctive relief to prevent further damage to Euclid's goodwill, reputation, products, and intellectual property.

COUNT II
TRADEMARK INFRINGEMENT – LANHAM ACT VIOLATIONS

37. Euclid incorporates by reference the above paragraphs of this Complaint as if fully rewritten herein.

38. By virtue of continued use and acquisition of secondary meaning, Euclid has the exclusive right to use or to authorize use of the INCRETE and INCRETE SYSTEMS marks throughout the United States in connection with the sale of the products.

39. Defendants are using in commerce the INCRETE and INCRETE SYSTEMS marks in connection with the sale of stamped concrete goods and related services.

40. Defendants' use of the INCRETE and INCRETE SYSTEMS marks is occurring without Euclid's consent and directly contrary to its written notices.

41. Upon information and belief, Defendants' use of the INCRETE and INCRETE SYSTEMS marks has caused, and is likely to continue to cause, mistake, or to deceive relevant portions of the public and thereby infringes Euclid's rights in the INCRETE and INCRETE SYSTEMS marks under the Lanham Act, 15 U.S.C. § 1125.

42. As a proximate result of the conduct of Defendants complained of herein, Euclid has suffered, will suffer, or is likely to suffer an economic loss and Defendants have gained, will gain, or are likely to gain a profit in amounts not yet determined.

43. The manner and amount of damage to Euclid caused or likely to be caused by the infringing activity of Defendants complained of herein cannot be fully measured or compensated in economic terms, and so cannot be adequately remedied at law. As a result, Euclid is suffering irreparable harm and this irreparable harm will continue unless Defendants' infringing activities are enjoined.

44. Upon information and belief, the conduct of Defendants complained of herein was done willfully, and was commenced with knowledge that such conduct was and is an infringement of Euclid's trademark rights, and with knowledge that such conduct was and is likely to confuse, mislead and deceive a significant portion of purchasers or other relevant members of the public.

45. Upon information and belief, the conduct of Defendants complained of herein makes this an exceptional case entitling Euclid to recovery of its reasonable attorneys' fees.

COUNT III
INFRINGEMENT OF A REGISTERED TRADEMARK -- LANHAM ACT VIOLATIONS

46. Euclid incorporates by reference the above paragraphs of this Complaint as if fully rewritten herein.

47. Defendants above-averred actions constitute infringement of the INCRETE SYSTEMS mark protected by the '070 Registration in violation of §32 of the Trademark of 1946, as amended, 15 U.S.C. §1114(1)(A).

48. On information and belief Defendants' infringement of the INCRETE SYSTEMS mark has caused or will cause Euclid to suffer economic loss and Defendants have gained or are likely to gain a profit as a consequence thereof in amounts not yet determined.

49. The manner and amount of damage to Euclid likely to be caused by the infringing activity of Defendants complained of herein cannot be fully measured or compensated in economic terms, and so cannot be adequately remedied at law. As a result, Euclid will suffer irreparable harm and this irreparable harm will continue unless Defendants' infringing activities are enjoined.

COUNT IV **DECEPTIVE TRADE PRACTICES**

50. Euclid incorporates by reference the above paragraphs of this Complaint as if fully rewritten herein.

51. The ODTPA, Ohio Rev. Code § 4165.01, et seq., prohibits, among other things: (a) "represent[ing] that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have," Ohio Rev. Code §4165.02(A)(7); and (b) advertising "goods or services with intent not to sell them as advertised" (the "Prohibitions"). Id. at § 4165.02(A) (11).

52. Defendants' advertising, including their website, violates the Prohibitions by the inclusion of false, deceptive, and confusing misrepresentations that Defendants are "the Tri-State distributor of Increte Systems" and that they provide "training and support to a network of successful, independent Increte Contractors."

53. Defendants' continued unauthorized use of the INCRETE and INCRETE SYSTEMS marks on their website and in their advertising also violates the Prohibitions.

54. Defendants' violations of these Prohibitions have proximately caused and will continue to cause damages to Euclid – both monetary damages and irreparable harm to Euclid's goodwill and public reputation that cannot be adequately remedied with monetary damages.

55. Thus, Euclid is entitled to an award of damages against Defendants in an amount to be proven at trial.

56. Pursuant to Ohio Revised Code, § 4165.03, Euclid is also entitled to a permanent injunction requiring Defendants to cease all false, deceptive, and confusing conduct and requiring Defendants to attempt to remediate their prior unlawful conduct.

57. Euclid is also statutorily entitled under ODTPA's terms, § 4165.03(B), to an award of its attorney fees incurred as a result of Defendants' wrongful conduct.

COUNT V

COMMON LAW UNFAIR COMPETITION

58. Euclid incorporates by reference the above paragraphs of this Complaint as if fully rewritten herein.

59. Defendants engaged in unfair competition by, among other things, publishing and circulating false representations that Defendants are “the Tri-State distributor of Increte Systems” and that they provide “training and support to a network of successful, independent Increte Contractors.”

60. Defendants also engaged in unfair competition by their continued unauthorized use of the INCRETE and INCRETE SYSTEMS marks on their website and in their advertising.

61. Upon information and belief, Defendants' unlawful conduct was designed to harm Euclid.

62. Defendants' unfair competition practices have proximately caused and will continue to cause damages to Euclid – both monetary damages and irreparable harm to Euclid's goodwill and public reputation that cannot be fully remedied with monetary damages.

63. Thus, Euclid is entitled to an award of damages against Defendants in an amount to be proven at trial.

64. Additionally, in order to remedy to the extent possible and prevent further immediate and irreparable harm to Euclid's goodwill and public reputation, Euclid is entitled to a permanent injunction requiring Defendants to cease all false, deceptive, and confusing conduct and requiring Defendants to attempt to remediate their prior unlawful conduct.

COUNT VI
BREACH OF CONTRACT -- FAILURE TO PAY FOR GOODS

65. Euclid incorporates by reference the above paragraphs of this Complaint as if fully rewritten herein.

66. As Euclid's distributor, Defendants entered into a number of written sales transactions with Euclid for the purchase of various products. Defendants issued purchase orders to and/or placed orders with Euclid for the purchase of such products.

67. Euclid agreed to fill Defendants' orders. At or near the time the orders were placed, the requested products were delivered to and accepted by Defendants. Defendants have not rejected or returned such products.

68. Euclid issued invoices to Defendants demanding payment for the products. Attached hereto are true and correct copies of invoices issued by Euclid to Defendants (the "Invoices"). The total amount of the Invoices exceed \$44,000. True and correct copies of the Invoices and Defendants' Statement of Account with Euclid are attached hereto as Exhibit 4.

69. Defendants agreed to pay the Invoices within thirty (30) days from the date of the Invoices.

70. Despite repeated demands since May 2009, Defendants have failed to pay the Invoices in full.

71. Defendants have not made a payment to Euclid since September 2010, and in November 2010, Defendants advised that they would make no additional payments to Euclid.

72. Defendants' failure to pay the Invoices in full constitutes a material breach of the parties' agreements.

73. Euclid has performed all obligations on its part to be performed pursuant to the sale transactions with Defendants.

74. As a direct and proximate result of Defendants' material breach, Defendants have caused Euclid monetary damages in an amount in excess of \$44,000.00 plus accrued interest from the date said amounts were due and payable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Euclid prays for damages and such further relief as follows:

A. Enter an Order requiring the following:

- (1) that Defendants and their agents, servants, employees, attorneys and all other persons in active concert or participation with them to permanently cease all false, deceptive, and confusing conduct, and unfair competition, including any unauthorized use of the INCRETE and INCRETE SYSTEMS marks and/or any marks similar thereto, or any reproduction, counterfeit, copy, or colorable imitation of such marks, in connection with

- the sale, offering for sale, distribution, and advertising of stamped concrete products and related goods and services;
- (2) that Defendants deliver to Euclid all printed and other materials, depicting the likeness of the infringing marks and false statements in Defendants' possession; and
- (3) that Defendants file with this Court and serve on Euclid within thirty (30) days after the service of the Order a report in writing, under oath, setting forth in detail the manner and form in which Defendants have complied with the Order;
- B. Award Plaintiff the actual damages it has sustained as a result of Defendants' infringement of Plaintiff's registered mark INCRETE SYSTEMS;
- C. Order that Defendants be required to account for and pay to Plaintiff all profits derived from Defendants' infringement of Plaintiff's registered mark INCRETE SYSTEMS;
- D. Order Defendants to pay the costs of this action pursuant to 15 U.S.C. §1117(a).
- E. Award Plaintiff the actual monetary damages it has suffered as a result of Defendants' unfair competition, false advertising, infringement of Plaintiff's rights in the marks INCRETE and INCRETE SYSTEMS, and/or Defendants' deceptive trade practices, which amount is to be determined at trial;
- F. Award Plaintiff punitive damages, and/or treble the damages Plaintiff has suffered as a result of Defendants' unfair competition, false advertising, trademark infringement, and/or deceptive trade practices;

- G. Award Plaintiff its actual damages resulting from Defendants breach of contract, which amount is to be determined at trial, but is not less than \$44,106.23, plus pre-judgment interest and post-judgment interest thereon;
- H. Award Plaintiff its costs, attorney's fees, and both pre-judgment interest and post-judgment interest; and
- I. Award any other relief, legal or equitable, that is warranted under the circumstances.

Dated: March 2, 2011

Respectfully submitted,

/s/ Christopher Williams

CHRISTOPHER WILLIAMS (0043911)
COLLEEN CONLEY (0073683)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, Ohio 44114
216-622-8200 phone, 216-241-0816 fax
cwilliams@calfee.com
cconley@calfee.com

*Attorneys for Plaintiff,
The Euclid Chemical Company*